

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



ORIGINAL

and Proof of Service

76-1575

To be argued by  
JESSE BERMAN

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

REYNALDO RODRIGUEZ,

Appellant.

-----X

B  
PDS  
Docket No. 76-1575

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION  
RENDERED IN THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK.

JESSE BERMAN  
Attorney for Appellant  
351 Broadway  
New York, New York 10013  
(212) 431-4600

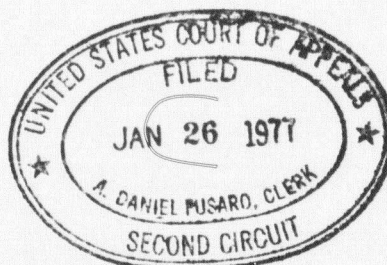


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ARGUMENT

THE POST-ARREST, IN-CUSTODY STATEMENTS OF APPELLANT, WHO WAS UNWARNED AND UNCOUNSELED, WHICH WERE PROVOKED BY AND MADE IN IMMEDIATE RESPONSE TO AN ACCUSATION BY A GOVERNMENT AGENT, WERE NEITHER SPONTANEOUS NOR FREE OF ANY COMPELLING INFLUENCE AND MUST BE SUPPRESSED . .	9
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-----X

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

REYNALDO RODRIGUEZ, :

Appellant. :

-----Y

Whether the post-arrest, in-custody statements of appellant, who was unwarned and uncounseled, which were provoked by and made in immediate response to an accusation by a government agent, and were neither spontaneous nor free of any compelling influence, must be suppressed.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (Lasker, J.), convicting appellant, upon his plea of guilty, of the crime of possession of cocaine with intent to distribute [21 U.S.C. §§812, 841(a)(1), and 18 U.S.C. §2], and sentencing him to imprisonment for one year and one day, followed by three years special parole.

Timely notice of appeal was filed and this Court, on December 16, 1976, appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant is presently incarcerated pursuant to the judgment herein.

B. Statement of Facts

Appellant was indicted, together with Adrian Garcia, for conspiracy to distribute cocaine (Count One) and for aiding and abetting Garcia in the attempted sale of approximately four (4) ounces of cocaine (Count Two).\*

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\* Garcia was additionally charged with possession of a revolver during the commission of the above two felonies (Count Three) and with assaulting agents of the Drug Enforcement Administration (D.E.A.) with a revolver (Count Four). Garcia pleaded guilty to Counts Two and Four and received concurrent three-year sentences on each Count.

The theory of the government's case against appellant was that several hours prior to Garcia's attempt to consummate the sale to D.E.A. Agent Schnakenberg, appellant, in the presence of the informant "Roberto," had spoken to Schnakenberg over the phone and had quoted a price, and that appellant had later accompanied Garcia to Eighth Avenue and 25th Street (the area of the projected delivery of the cocaine) in Garcia's car and did not proceed to the actual scene of the contemplated sale.

In order to prove appellant's identity as the person who had quoted the price to Schnakenberg over the phone, the government planned to offer a statement allegedly made by appellant within seconds after his arrest at Eighth Avenue and 25th Street. A hearing was held, on September 21, 1976, on the admissibility of that statement.

(1) The Suppression Hearing

D.E.A. Agent William Schnakenberg testified that, on February 21, 1975, he, "Roberto" (the informant) and an unidentified New York City police officer all approached appellant at the scene of his arrest just after D.E.A. Agent McMullan (the arresting officer) had handcuffed appellant. "Roberto" pointed at appellant and said that appellant was the person who had been on the telephone with Schnakenberg. Appellant then cursed "Roberto," lunged at "Roberto," and responded that,

"Yes," he had been on the phone with Schnakenberg, but that it was not his "stuff," and that he had trusted "Roberto" because he was a friend of appellant's family in Florida (H. 12-14).\*

Agent McMullan then started to give appellant his rights advice, but Schnakenberg turned away at that point, and when Schnakenberg turned back, appellant was repeating the same statement. Schnakenberg thus never heard McMullan complete the rights advice (H. 14-15). Appellant also repeated the same statement in the agents' car while on the way to a precinct house for booking (H. 16).

On cross-examination, Schnakenberg testified that when arrested, appellant was sitting in the passenger seat of a parked, driverless car (H. 24). Both Schnakenberg and McMullan identified themselves to appellant as federal officers and told him that he was under arrest (H. 27-28). McMullan arrested appellant at gunpoint (H. 28), and handcuffed him, with his hands cuffed in front of him (H. 40).

Schnakenberg could not testify to hearing McMullan give any specific rights advice: "I did not hear anything" (H. 29-30; 35), and appellant first made the statement before McMullan had ever started to try to give him his rights (H. 33).

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\* "H" refers to minutes of the suppression hearing, September 21, 1976.

"Roberto" was "battering" that appellant was the one who had been on the phone (H. 33), and appellant's immediate response "acknowledged" "Roberto's" accusation:

Q. ...Your testimony is that first Roberto said that [appellant] had been the one on the phone and after that it was [appellant], in effect, that acknowledged that he had been the one on the phone?

A. Yes, sir. ...within a split second.

(H. 34; emphasis added).

Just prior to appellant's arrest, and within earshot of appellant, there had been shooting, in connection with the arrest of Garcia (H. 48).

Schnakenberg acknowledged that at no time did he ever hear appellant get a full set of Miranda warnings (H. 44;47).\*

D.E.A. Agent William McMullan testified that soon after the shooting (involving Garcia), he went to the parked, driverless car at Eighth Avenue and 25th Street and saw appellant sitting in the front passenger seat. McMullan identified

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\* On re-direct, the prosecutor attempted to rehabilitate this deficiency in Schnakenberg's testimony, but the Court observed that:

Twice he said he didn't hear them given in full. I couldn't pay much attention if he now said he did hear them given in full.

(H. 47)

himself as "police" and told appellant that he was under arrest (H. 50). McMullan then ordered appellant to exit from the car. Appellant complied, and McMullan took him to the rear of the car, placed one handcuff on him and began to give appellant his rights, which McMullan never completed, because of the incident with "Roberto" (H. 51). According to McMullan, he later completed giving the rights advice, in the government car, and appellant continued to repeat the same statement (that it was he who had been on the phone) in the government car (H. 52).

On cross-examination, McMullan testified that, after the shooting, he went to the area of the parked car and arrested appellant, at gunpoint. McMullan aimed his gun at appellant through the car window, identified himself as a police officer, told appellant he was under arrest, and ordered appellant to place his hands on his head and to exit from the car. Appellant complied, and after McMullan patted appellant down and handcuffed him, "Roberto" arrived (H. 53-54). Appellant was ultimately handcuffed with his hands behind his back (H. 60).

After appellant was placed in the government vehicle, McMullan completed giving the rights advice and asked appellant if he wanted to say anything. Appellant responded that, "No," he did not want to say anything (H. 60; 62).

During the course of colloquy, the Court stated:

McMullan had just started to give the warnings when all hell broke loose and it was about that time that the first statement was made, so I don't doubt that [appellant] had not been fully advised of his rights before he made the statement the first time.

\* \* \*

It is impossible for the Court to determine what warnings were given. I find that.

(H. 95)

Hilario Monteagudo ("Roberto") \* testified that, after the shooting, he went to Eighth Avenue and 25th Street and told Schnakenberg that appellant, who was already handcuffed (H. 75), was the person who had spoken over the phone with Schnakenberg (H. 68-69). Appellant cursed "Roberto,"\*\* said he would kill him,

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\* The government represented to the Court that "Roberto" had been arrested in Miami in September 1974 for possession of cocaine, had cooperated with the government in making cases, and, as a result, the Miami charges against "Roberto" were dropped on February 28, 1975 (H. 5-6).

It further represented that payments had been made by the government to "Roberto," between September 12, 1974, and September 3, 1976: \$1,300-\$1,400 in Miami and \$5,000 in New York (H. 8-9).

\*\* "Roberto" claimed appellant called him a "son of a bitch" (H. 69).

Schnakenberg claimed that appellant called "Roberto" a "motherfucker" (H. 21).

"Roberto" claimed the curse words were in Spanish (H. 90). Schnakenberg, who does not understand any Spanish (H. 93), claimed that the curse words were in English (H. 92).

swung his arms, which were handcuffed in front of him, and said he had trusted "Roberto" because "Roberto" knew appellant's family (H. 69-71).

On cross-examination, "Roberto" testified that, speaking about appellant, he said to Schnakenberg, "this is the guy that spoke to you on the phone about a dealer of cocaine," and that appellant had responded:

Yes, I spoke to you on the  
phone but this is no [sic]  
my cocaine.

(H. 78; emphasis added)

Appellant's above statement was immediate, and it came in response to what "Roberto" had just said (id.).

At the time of the above incident, "Roberto" was in the employ of the federal government as a paid informant (H. 79), and the Court found that "there is no doubt" that "Roberto" was a government agent at that time (H. 80).

At the close of the hearing, the Court, in the course of colloquy, ruled that:

I find that the statement which  
[appellant] made was not compelled...  
however emotional the admission was  
at that time.

(H. 113; A-18)\*

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\* "A" refers to Appellant's Appendix, in which the Court's entire opinion (in the course of colloquy) is reproduced, at A-10 through A-19.

(2) The Plea and Sentence

After the Court announced its ruling at the conclusion of the suppression hearing, appellant pleaded guilty to Count Two of the indictment herein, with the government and the Court agreeing, on the record, that the plea was on the express condition that the issue of the admissibility of appellant's above-described "statements made to the two agents and to "Roberto" be preserved for appeal, and that appellant may withdraw that plea should this Court reverse on that issue of the admissibility of those statements (H. 165; 167).

On November 19, 1976, the Court sentenced appellant to imprisonment for one year and a day, followed by three years special parole.

ARGUMENT

THE POST-ARREST, IN-CUSTODY STATEMENTS OF APPELLANT, WHO WAS UNWARNED AND UNCOUNSELED, WHICH WERE PROVOKED BY AND MADE IN IMMEDIATE RESPONSE TO AN ACCUSTATION BY A GOVERNMENT AGENT, WERE NEITHER SPONTANEOUS NOR FREE OF ANY COMPELLING INFLUENCE AND MUST BE SUPPRESSED.

This case calls upon this Court to decide whether the post-arrest, in-custody statements of an unwarned suspect who does not have an attorney, provoked by and made in immediate response to an accusation by a government agent, can be deemed spontaneous and free of "any compelling influences." Miranda v. Arizona, 384 U.S. 436, 478 (1966).

It is beyond dispute that appellant's statements herein were made post-arrest and while in custody. But it should be emphasized that appellant made the statements at a particularly vulnerable point in his custody: He had just heard the shooting and had just been arrested at gunpoint, had just been told to get out of the car and had complied with that order, had just been told to put his hands on his head and had complied with that order, had just been handcuffed and was surrounded by law enforcement agents. Appellant was thus at his peak of confusion and compliance.

It is also beyond dispute that appellant had no attorney when he made the statements and the Court specifically found that appellant

...had not been fully advised of his rights before he made the statement the first time. ... It is impossible for the Court to determine what warnings were given. I find that.

(H. 95)

And, significantly, once McMullan later finally completed giving the rights advice and then asked appellant if he wanted to say anything, appellant responded that, "No," he did not want to say anything.

Nor is there any dispute on the question of whether "Roberto" was a government at the time he made (or rather, "hollered")

his provocative accusation; the Court found that "there is no doubt" that "Roberto" was a government agent at the time (H. 80).

We urge this Court to find that, as a matter of law, it is equally indisputable that appellant's statements were provoked by and made in response to "Roberto"'s accusations as opposed to being wholly spontaneous and free of any compelling influence. The conclusion that appellant's statements were provoked by and made in response to "Roberto"'s accusation is inescapable for several reasons: First, "Roberto" himself acknowledged, in his testimony, that appellant's statements came immediately after his accusation and were in response to that accusation (H. 78).

Second, the very statement itself was in the nature of a response: Both Schnakenberg and "Roberto" testified that appellant began with the word "Yes,"\* and Schnakenberg, on cross-examination, agreed that appellant, in his statement, "acknowledged" what "Roberto" had accused him of only "a split second" earlier (H. 34).

Third, apart from "Roberto"'s agreeing that the statement was a response, apart from the fact that the statement begins with a "Yes," apart from the fact that it came immediately after

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\* "Yes, I'm the one that was on the telephone with you" (H. 14, Schnakenberg).

"Yes, I spoke to you on the phone" (H. 78, "Roberto").

"Roberto"'s accusation, there is the obvious fact that appellant's statement is, by both its very subject matter and its form, an answer to what "Roberto" had just accused him of.

Fourth, "Roberto"'s accusation was particularly provocative and evocative of a response, because "Roberto" was more than just an agent; he was an eyewitness to appellant's end of the telephone conversation.

Finally, it matters not that what "Roberto" said was not in the form of a question; what matters is that what appellant said came in response to what "Roberto" said. It is just as if a police officer had said to an unwarned murder suspect, "We know you buried the gun in your back yard" and the suspect had responded, "Yes, I buried it in my back yard." The hypothetical officer's remark was not a question, but the hypothetical suspect's response was no less an answer, and there is no such thing as a 'spontaneous' answer or a 'spontaneous' response.

When the Supreme Court, in Miranda, supra, spoke of spontaneously volunteered statements being admissible, it gave the following examples:

There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make.

Miranda, supra, 384 U.S. at 478.

Two factors are immediately apparent from this series of examples. (1) The confessions in these hypotheticals were not made in response to anything said by the police [Redmon v. United States, 355 F. 2d 407, 412 (9th Cir. 1966)], and (2) The persons who made the confessions in these hypotheticals were "not under restraint or custody" [Amass v. United States, 413 F. 2d 272, 273 (2d Cir. 1969)].

That non-custodial statements are not covered by Miranda is now, of course, well settled. Oregon v. Mathiason, \_\_\_\_ U.S. \_\_\_\_ (January 25, 1977). But it should be equally obvious that <sup>(an in-custody)</sup> statement made in response to an accusation by a government agent\* is covered by Miranda and cannot be deemed spontaneous or free from any compelling influence.

Not only was appellant's statement made in response to "Roberto"'s accusation, but the accusation also created a

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\* In Redmon, supra, the agents had merely asked the defendant for his name and identity. The defendant, however, then spontaneously asked the agents "to get him out of that area because the guy he bought the stuff from lived near there." The Court held that "such statement was unresponsive, spontaneous, and voluntarily made by appellant for his own reasons." Redmon, supra, 355 F. 2d at 412, emphasis added.

compulsion to explain what "Roberto" had said, to say, essentially, "Yes, but...". This was because, if left unanswered, "Roberto"'s accusation left the impression that appellant was the seller of the cocaine, when, in fact, appellant had merely communicated a price and the cocaine never belonged to appellant.\* "Roberto"'s accusation thus created a compulsion to answer.\*\*

Finally, no distinction should be made between appellant's statements on the street and his repetition of the exact same statement moments later in the government vehicle, because it was the same continuous statement, made in the same "emotional" state (H. 113), in a continuing response to what "Roberto" had said, without appellant ever having first calmed down, and thus, with "no break in the stream of events." Clewis v. Texas, 386 U.S. 707, 710 (1967).

Appellant's statements must be suppressed and his guilty plea vacated.

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\* The government did not claim that appellant ever possessed the cocaine (H. 168).

\*\* Silence in the face of an accusatory statement, where understood and where there exists an opportunity to deny, is admissible as an admission of guilt.

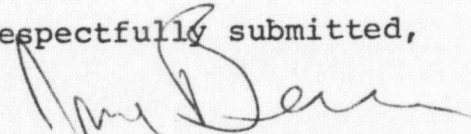
Osborne v. United States,  
371 F. 2d 913, 924 (9th Cir. 1967).

See also, Federal Rule of Evidence 801 (d)(2)(B).

CONCLUSION

THE STATEMENTS SHOULD BE  
SUPPRESSED, THE JUDGMENT  
REVERSED AND THE GUILTY  
PLEA VACATED.

Respectfully submitted,



JESSE BERMAN  
Attorney for Appellant  
351 Broadway  
New York, New York 10013  
(212) 431-4600

January, 1977

AFFIDAVIT OF SERVICE

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

NANCY JAINCHILL, being duly sworn, deposes  
and says: deponent is not a party to the action, is over  
18 years of age and resides at 10 Lenox St; NY 10013  
On July 26, 1977, served the within Appellant's Brief  
upon Robert B. Fiske, Jr. attorney(s)  
for Appellee in this action, at  
1 St. Andrew's Plaza, NY 10007  
the address designated by said attorney(s) for that purpose  
by depositing a true copy of same enclosed in a post-paid  
properly addressed wrapper, in - ~~post-office~~<sup>an</sup> official  
depository under the exclusive care and custody of the  
United States Postal Service within the State of New York.

Nancy Jainchill  
NANCY JAINCHILL

Sworn to before me on  
July 26, 1977.

John R. [Signature]

JOHN R. [Signature]  
Notary Public, State of New York  
No. 314290718  
Qualified in New York County  
Commission Expires March 30, 1978